ASIA COMMERCIAL FINANCE (M) BHD

v.

REGIONAL BRILLIANCE SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-695(A)-2000]
18 JUNE 2002

LAND LAW: *Charge - Order for sale - Cause to the contrary - Whether established - Service and amount specified in notice of demand - Whether proper - Whether Form 16D ambiguous - Whether variation of interest by chargee valid and enforceable - Whether O. 83 r. 3(3) Rules of the High Court 1980 complied with - National Land Code, ss. 256, 257(1)(c)*

CIVIL PROCEDURE: *Action - Charge action - Statutory particulars under O. 83 r. 3(3) Rules of the High Court 1980 - Whether to be provided in the affidavit in support of the originating summons - Whether subsequent affidavits can also provide them - Rules of the High Court 1980, O. 83 r. 3(3) - National Land Code, s. 257(1)(c)*

This was the plaintiff's application for an order for sale of the defendant's security under s. 256 of the National Land Code ('NLC') upon the default of the defendant in the payment of its monthly instalments for a loan sum of RM5 million. The court had to determine whether the defendant established any cause to the contrary upon the following: (1) whether the plaintiff's service of notice of demand and amount specified therein was proper; (2) whether the plaintiff's Form 16D was ambiguous; (3) whether the variation of interest by the plaintiff was valid and enforceable; and (4) whether the plaintiff complied with O. 83 r. 3(3)(a) to (d) of the Rules of the High Court 1980 ('RHC') as the plaintiff's last affidavit did not provide the statutory particulars thereunder.

Held:

[1] Upon a proper construction of para 2 of the annexure to the charge, it was clear that the notice of demand might be served on any of the addresses specified therein but these addresses were not intended to be exhaustive or exclusive. The effect of the words "may be made by notice" was merely directory and not mandatory so that it was permissible for the plaintiff as chargee to serve the notice of demand on the defendant as chargor at any address other than those specified in para 2, so long as it was received by the defendant. (p 642 f-g)

[2] The notice of demand in question was sent to the latest addresses of the defendant which the plaintiff discovered after conducting a search at the registry of companies. There was no denial whatsoever by the defendant. Therefore, the defendant must have received the notice of demand. (pp 642 h-i & 643 a)

[3] There had been no immediate contemporaneous denial by the defendant in relation to the outstanding balance as at 30 September 2000 specified in the notice of demand. However, on 19 January 2001, the defendant in its affidavit in encl. 4, disputed the outstanding balance as not valid with no legal force. This was raised for the first time after a lapse of three months and one day. This was too late in the day and it was either an afterthought or at best bordering on the verge of being an afterthought. (p 643 b-c)

[4] Paragraph 1.1 of the annexure to the charge required the defendant on demand by the plaintiff to pay the plaintiff the loan sum of RM5 million with all accrued interest specified therein, and until the demand as aforesaid, the defendant as chargor was required to pay the monthly instalments as stated in the annexure. Therefore, the obligation to make payment of the monthly instalments without any notice pursuant to the charge fell firmly on the defendant. Although it had been held that a notice of demand was generally not a prerequisite to a charge action, in the instant case, in accordance with the established practice of banks and financial institutions, the plaintiff had served a notice of demand on the defendant before commencing a charge action, so that should the defendant as chargor intend to dispute the outstanding balance or the accrued interest, the defendant could do so without undue delay. But herein the defendant chose not to. (p 643 d-f)

[5] On the same grounds rejecting the defendant's contention that it had not received the plaintiff's notice of demand, its contention that it had not received the plaintiff's statutory notice in Form 16D was also rejected. Further, the plaintiff, through one Ahmadsha bin Ishaque had sworn a statutory declaration that he had served the Form 16D on the defendant at the addresses mentioned therein. The defendant did not deny or rebut the said addresses. Also, the defendant did not submit that the instant originating summons which was identically addressed as the notice of demand and the Form 16D was not received by the defendant. That meant that the defendant should have received the notice of demand and the Form 16D. (p 644 b-f)

[6] The Form 16D referred to the default by the defendant in not complying with the notice of demand dated 18 October 2000 for the sum of RM5,633,483.14 as at 30 September 2000 together with all interest accrued from 1 October 2000 to the date of full realisation. The plaintiff also gave the defendant seven days to remedy the default, failing which the plaintiff would proceed to obtain an order for sale. Hence, there was no ambiguity in the Form 16D. (pp 644 g-h & 645 a)

[7] Paragraph 4(1) of the annexure to the charge permitted the variation of interest by the plaintiff by a mere unilateral act of serving a notice in writing on the defendant as chargor. Also, the defendant had actually applied to and requested the plaintiff for a moratorium and the parties had concretised their own rights and obligations. Therefore, the variation of interest and the terms and conditions therein were valid and legally enforceable. (p 647 a-b)

[8] Under O. 83 r. 3(1) RHC, "the affidavit in support of the originating summons" and the "affidavit" contained in O. 83 r. 3(3) must be the first affidavit which is filed by the plaintiff in support of the plaintiff's charge action. However, more affidavits may be filed as the word "affidavit" in the singular includes the plural, unless there is express provision to the contrary (Section 4(3) of the Interpretation Acts 1948 and 1967). The statutory particulars under O. 83 r. 3(3) may be provided in the affidavit or affidavits before the final hearing *(Citibank NA v. Ibrahim bin Othman).* Further, the statutory particulars as set out in the plaintiff's affidavit in support of the originating summons had complied with O. 83 r. 3(1) and (3) RHC. Apart from this, pursuant to s. 257(1)(c) of the National Land Code, the plaintiff had specified the total amount due to it in para. 3 of its latest affidavit. (pp 648 c-d & 649 e-f)

[9] The law and the facts were not in favour of the defendant. Therefore, the defendant failed to establish any cause to the contrary. (p 652 b)

[Order for sale.]

Case(s) referred to:

Bangkok Bank Bhd v. Chuan Kee Co Sdn Bhd [2000] 1 CLJ 766 ***(refd)***

Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608 ***(foll)***

Credit Corp (M) Bhd v. Lucky Height Development Sdn Bhd & Ors [1996] 4 MLJ 556 ***(dist)***

Malaysia Building Society Bhd v. Univein Sdn Bhd [2002] 2 CLJ 81 ***(refd)***

Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd & Anor [2000] 2 CLJ 73 ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 4(3)
National Land Code, ss. 256, 257(1)(c)
Rules of the High Court 1980, O. 14, O. 83 r. 3(1), (3)(a)-(d)

For the plaintiff - Maria Madiah; M/s WK Chan & Co
For the defendant - Kumari Bala; M/s Koh Nai Kwong & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Application
This is the plaintiff's application in encl. (1) for an order for sale under s. 256 of the National Land Code 1965.

By consent of the parties herein, this decision shall be binding on and hence dispose of another case, ie, SP 24-695(B)-2000 pending in this court.

Facts Of The Case
The uncontroverted facts herein are simple and straightforward. On the defendant's application, the plaintiff granted a term loan of RM5 million to the defendant subject to the terms and conditions as contained in the annexure to the charge dated 25 October 1996. As the defendant has repeatedly defaulted in the payment of the monthly instalments prescribed in the annexure to the charge, the plaintiff therefore commenced these foreclosure proceedings.

Parties' Submissions And Court's Decision
Cik Kumari Bala, learned counsel for the defendant, has raised several interesting and important issues by way of objection to the plaintiff's application for an order for sale to which Cik Maria bt Madiah, learned counsel for the plaintiff, has responded. These issues, which I have heard and determined thereon, may be identified as follows:

Plaintiff's Notice of Demand
It was submitted for the defendant that the plaintiff's notice of demand dated 18 October 2000 has specified sums which were not legally due from the defendant and that it has been sent to D4-03, Plaza Jayamuda, Jalan Pelandok Putih, Jalan Ong Kim Wee, Melaka Raya, Melaka and Lot G33, Best Worls Plasa, Johore Bahru, 80000 Johore, but not to the defendant's registered office at No. 539, Taman Melaka Raya, 75000 Melaka, and so the defendant has not received it.

For the plaintiff, it was submitted that although the defendant's address stated in the charge was No. 539, Taman Melaka Raya 75000 Melaka, the plaintiff's official search at the registry of companies revealed that the defendant's address has since been changed to those stated in the notice of demand, the receipt of which has been duly acknowledged by the defendant. In any event, it was argued for the plaintiff that for the purposes of commencing a charge action, the service of a notice of demand is not a precondition or prerequisite.

For the purpose of determining on the issue, I find it necessary to refer to para. 2 of the annexure to the charge which provides for the mode of serving a notice of demand, as follows:

> 2. Any demands for payment of the moneys intended to be hereby secured **may be made by a notice** in writing requiring payment within seven (7) days from the date thereof and may be signed on behalf of the Chargee by the Manager Assistant Manager Sub-Manager Accountant or any other Officer of the Chargee or by any solicitor or firm of solicitors purporting to act for the Chargee and such notice shall be deemed to have been sufficiently served on the Chargor(s) if it is left at the usual or last known place of residence or at the address above stated of the Chargor(s) or at the usual or last known place of business of the Chargor(s) or sent by first class inland letter to any of such addresses and in the last mentioned case the service shall be deemed to be made forty eight (48) hours after posting notwithstanding that it be undelivered or returned undelivered and in proving such service it shall be sufficient to prove that the notice was properly addressed and posted. (emphasis added)

Upon a proper construction of para. 2 above, it is clear that the notice of demand may be served on any of the addresses specified therein but these addresses are not intended to be exhaustive or exclusive. The effect of the words "may be made by notice" is merely directory and not mandatory so that it is permissible for the plaintiff as chargee to serve the notice of demand on the defendant as chargor at any address other than those specified in para. 2 above, so long as it has been received by the defendant as chargor.

It is to be noted that the notice of demand in question which is dated 18 October 2000 (exh. B) in the plaintiff's affidavit affirmed on 3 January 2001 was sent by registered mail and certificate of posting to the defendant as chargor at two addresses *viz.* D4-03, Plaza Jayamuda, Jalan Pelandok Putih, Off Jalan Ong Kim Wee 75300 Melaka and Lot G33, Best Worls Plasa, Jalan Tun Abdul Razak, Johor Bahru 80000 Johor which were the latest addresses of the defendant as the plaintiff has discovered after

conducting a search at the registry of companies. There has been no denial whatsoever by the defendant that these are the defendant's latest addresses. I am therefore unable to accept the defendant's version that the defendant did not receive the notice of demand.

As regards the outstanding balance of RM5,633,483.14 as at 30 September 2000, which was specified in the notice of demand, there has been no immediate contemporaneous denial thereof by the defendant. However, on 19 January 2001, in the defendant's affidavit in encl. (4), the defendant disputed that the outstanding balance is not valid and has no legal force as the plaintiff is not entitled thereto. This was raised for the first time after a lapse of three months and one day. In my view this is too late in the day and it is either an afterthought or at best it is bordering on the verge of being an afterthought.

Paragraph 1.1 of the annexure to the charge requires the defendant on demand by the plaintiff to pay the plaintiff the loan sum of RM5,000,000 with all accrued interest specified therein, and until the demand as aforesaid, the defendant as chargor is required to pay the monthly instalments as stated in the annexure. Therefore, the obligation to make payment of the monthly instalments without any notice pursuant to the charge falls firmly on the defendant. Although it has been held that a notice of demand is generally not a prerequisite to a charge action (see *Bangkok Bank Bhd v. Chuan Kee Co Sdn Bhd* [2000] 1 CLJ 766), in the instant case, in accordance with the established practice of banks and financial institutions, the plaintiff has served a notice of demand on the defendant before commencing a charge action, so that should the defendant as chargor intend to dispute on the outstanding balance or the accrued interest, the defendant could do so without undue delay, but the defendant has chosen not to.

I am therefore unable to sustain the defendant's submission on this issue.

Plaintiff's Statutory Notice in Form 16D

It was argued for the defendant that Form 16D was also not received by the defendant as it was sent to the aforesaid two addresses but not the defendant's registered office.

In addition, it is the defendant's case that the amount claimed was ambiguous, being a sum in excess of the defendant's liability under the charge, ie, interest at 2.5% p.a. plus BLR while the charge prescribed an interest of 1.75% p.a. plus BLR. The plaintiff was said to be in breach of cl. 4(1) of the charge annexure as the defendant was not notified of the interest variation, and so Form 16D was invalid and ineffectual.

The plaintiff's contention is that Form 16D is valid and legally enforceable.

On the aforesaid grounds as given in rejecting the defendant's contention that the defendant has not received the plaintiff's notice of demand, I hereby reject the defendant's case that the defendant has not received the plaintiff's statutory notice in Form 16D. Further, it is to be noted that the plaintiff has through one Ahmadsha bin Ishaque sworn a statutory declaration on 20 November 2000 that he had on 14 November 2000 served the said Form 16D on the defendant by leaving a copy thereof at the defendant's address for service at D4-03 Plaza Jayamuda, Jalan Pelandok Putih, Off Jalan Ong Kim Wee, 75300 Melaka, and that he had on 14 November 2000 sent another copy of the said Form 16D by A.R. Registered post to the defendant's registered address at Lot G33, Best Worls Plasa, Jalan Tun Abdul Razak Johor Bahru, 80000 Johor and exhibited the A.R. Card with acknowledgment. There is no denial or rebuttal by the defendant that the aforesaid addresses are not those of the defendant.

It is at this juncture appropriate to observe that learned counsel for the defendant quite correctly has not submitted that the instant originating summons which was identically addressed to the aforesaid two addresses had not been received by the defendant. As a matter of fact, the defendant has not only received the instant originating summons but also retained learned counsel to defend it. The truth of the matter is that the notice of demand, the said Form 16D and the instant originating summons have all and sundry been consistently received by the defendant and this gave rise to the defendant's ability to file the memorandum of appearance. The submission that the defendant has not received the said notice of demand and the said Form 16D, both of which carried identical addresses as the originating summons herein, immediately collapses or disintegrates like dominoes, detrimentally.

The said Form 16D referred to the default by the defendant in complying with the said notice of demand dated 18 October 2000 for the sum of RM5,633,483.14 as at 30 September 2000 together with all interest accrued from 1 October 2000 to the date of full realisation. The plaintiff also gave the defendant seven days to remedy the default, failing which the plaintiff would proceed to obtain an order for sale.

I am unable to see any merit in the defendant's contention on the basis of ambiguity in the said Form 16D. One must not impute or attribute an ambiguity when there is none. An ambiguity arises when there is a "double

meaning, either deliberate or caused by inexactness of expression" or an expression is "able to be interpreted in more than one way" (see *The Concise Oxford Dictionary* 9th edn 1995). A careful reading of the said Form 16D makes it demonstrably clear and specific, and the ambiguity, if any, is merely illusory or imaginary.

In *Credit Corp (M) Bhd v. Lucky Height Development Sdn Bhd & Ors* [1996] 4 MLJ 556, on which the defendant relied, summary judgment under O. 14 of the Rules of the High Court 1980 was given in favour of the plaintiff. On appeal to the judge in chambers, the question was whether there were triable issues, which Kamalanathan Ratnam JC (later J) held there were and the appeal was allowed. That case had nothing to do with foreclosure proceedings and one cannot reasonably see how reliance or assistance may be derived therefrom in favour of the defendant's contention herein.

New Facts On Interest Variation

It was canvassed for the defendant that the plaintiff's affidavit affirmed by one Goh Teck Kian (encl. (5)) for the plaintiff has brought in new facts pertaining to the moratorium payment to support the variation of interest as stated in the letter of offer for moratorium dated 22 April 1999, the acceptance of which must reach the plaintiff on or before 29 April 1999; and that although the defendant accepted this offer on 29 April 1999, the acceptance was actually forwarded by the defendant to the plaintiff on 10 June 1999, when the offer has lapsed resulting in the acceptance being invalid and having no force of law.

For the plaintiff, it was submitted that the original rate of interest at 1.75% p.a. plus BLR has been agreed to by the defendant as this was one of the conditions stated in the plaintiff's letter dated 22 April 1999 wherein the total number of monthly instalments had been extended from 144 months to 156 months, which the defendant's directors have affixed their signatures thereto on 29 April 1999. The variation of interest is therefore valid.

I note that para. 1.1(a) of the annexure to the charge prescribes the interest rate of 1.75% p.a. above the plaintiff's BLR which was 9.15% at the time of execution of the charge. However, in view of the financial straits faced by the defendant, particularly with specific reference to the payment of monthly instalments on the outstanding balance, the defendant has applied to the plaintiff for a moratorium of instalment payment for 12 months commencing 1 April 1999, to which the plaintiff has agreed in writing *vide* exh. A, ie, letter to the defendant dated 22 April 1999 in the plaintiff's affidavit affirmed on 15 February 2001 (encl. (5)). The terms of the

moratorium include, *inter alia*, the capitalised outstanding balance of RM5,158,284.02; a moratorium of 12 months commencing 1 April 1999; interest at 2.5% above the plaintiff's BLR which was 9.0% p.a. then; the tenure of facility is extended from 144 months to 156 months and to service monthly interest; and finally regular instalment payments on the 13th month, ie, 1 April 2000 payable over 116 months, ie, RM75,865 per month. All these conditions have been agreed to by the guarantors Goh Chai Hoe, Eric Tan Eng Huat, Eng Son Yam and Poh Chong Peng. In addition, the defendant has *vide* directors' circular resolution dated 22 April 1999 (exh. B) accepted *in toto* all the conditions set out in the plaintiff's letter of the same date.

Further, para. 4(1), (2) and (3) of the annexure to the charge provides for the variation of interest rate in the following words:

Variation of interest rate

4(1) Notwithstanding the provisions relating to the rate of interest or the Chargee's Base Lending Rate of interest and/or the percentage of interest imposed above the Chargee's Base Lending Rate as hereinbefore provided, the Chargee shall be entitled at any time and from time to time to vary at its discretion the rate of interest or the Base Lending Rate and/or such percentage of interest imposed above the Chargee's Base Lending Rate by serving a notice in writing on the Chargor(s) of such intention and such amended rate of interest or Base Lending Rate and/or the percentage of interest imposed above the Chargee's Base Lending Rate shall be payable as from the date specified in the said notice.

(2) The decision of the Chargee as to what at any time is the rate of interest chargeable shall be final and conclusive and shall not be questioned on any account whatsoever.

(3) Where repayment of the Loan and interest thereon is by way of instalment, then if and whenever the rate of interest payable by the Chargor(s) under this Charge shall be varied in the manner herein this Charge appearing, the Chargee may, at its absolute discretion, make the necessary adjustment consequent upon such variation either:

(a) by varying the amount of the instalments; or

(b) by varying the number of the instalments.

Since the parties have executed the charge documentation, they are bound by the terms therein. Paragraph 4(1) of the annexure to the charge permits the variation of interest by the plaintiff by a mere unilateral act of serving a notice in writing on the defendant as chargor. Be that as it may, in the instant case, the defendant has actually applied to and requested the plaintiff for a moratorium as alluded to above and the parties have concretised their own rights and obligations in the manner as adumbrated above, in which event, I am of the view that the variation of interest and the terms and conditions therein are valid and legally enforceable.

Non-compliance With O. 83 r. 3(3)

It was submitted for the defendant that although the plaintiff's first affidavit gave details of the particulars of various amounts owing as at 7 December 2000, the plaintiff's last affidavit affirmed on 8 January 2002 merely gave an outstanding sum of RM1,170,018.75 as at 17 January 2002, without stating the amount of the advance, the amount of the repayment, the amount of any interest or instalments in arrear and the amount remaining due under the charge, as required by O. 83 r. 3(3)(a) to (d). Learned counsel for the defendant added that these statutory particulars must be given in the last and not the first affidavit in support of the plaintiff's originating summons herein; and that there was also some ambiguity in the sums payable by the defendant which the defendant has disputed.

For the plaintiff, it was argued that O. 83 r. 3(3)(a) to (d) had been complied with by the plaintiff in the plaintiff's first affidavit and the total amount under s. 257(1)(c) of the National Land Code 1965 as at 31 January 2002 has been stated as RM6,570,479.60 and that there has been no concealment of facts by the plaintiff as the statutory particulars in question has been made known to the defendant.

In view of the great emphasis placed by learned counsel for the defendant pertaining to the provisions of O. 83 r. 3(1) and (3)(a) to (d), it is best to reproduce it as follows:

> **3 Action for possession or payment (O. 83 r. 3)**
>
> (1) The affidavit in support of the originating summons by which an action to which this rule applies is begun must comply with the following provisions of this rule.
>
> This rule applies to a charge action begun by originating summons in which the plaintiff is the chargee and claims delivery of possession or payment of moneys secured by the charge or both.
>
> (2) …

(3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of:

(a) the amount of the advance;

(b) the amount of the repayments;

(c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and

(d) the amount remaining due under the charge.

Under O. 83 r. 3(1), "the affidavit in support of the originating summons" and "the affidavit" contained in O. 83 r. 3(3) must in my view be the first affidavit which is filed by the plaintiff in support of the plaintiff's charge action, but more affidavits may be filed as the word "affidavit" in the singular includes the plural, unless there is express provision to the contrary. This rule of construction also applies to the construction of public documents: see s. 4(3) of the Interpretation Acts 1948 and 1967.

Support for my view in this regard is to be found in *Citibank NA v. Ibrahim bin Othman* [1994] 1 MLJ 608 where Shankar J (later JCA) held, *inter alia*, that it is incumbent on the plaintiff to provide the statutory particulars in the first affidavit, but added at p. 615A-C as follows:

> It is a well-established rule of construction that unless the context specifically so excludes, words in the singular must include the plural. It is to be noted that O. 83 r. 3(3) gives the court the power to dispense with the statutory particulars 'in any case or class'. More than one affidavit can and is usually filed in this type of case because invariably the matter cannot be disposed of on the first return date (eg, for non-service) and at least one further affidavit is always required to state the total amount due on the date of the order. Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the defendant.

The principle enunciated above shows that the particulars under O. 83 r. 3(3) may be provided in the affidavit or affidavits before the final hearing. This was followed by Jeffrey Tan, J in *Multi-Purpose Bank Bhd v. Diamond Agreement Sdn Bhd & Anor* [2000] 2 CLJ 73; and RK Nathan J in *Bangkok Bank Bhd v. Chuan Kee Company Sdn Bhd* [2000] 1 CLJ 766; (see also *Malaysia Building Society Bhd v. Univein Sdn Bhd* [2002] 2 CLJ 81).

Paragraph 10 of the plaintiff's affidavit in support affirmed on 3 January 2001 (encl. (12)) of the originating summons herein sets out the statutory particulars as follows:

(a) the amount of the advance	RM5,000,000
(b) the amount of the repayments as at 7 December 2000	RM1,973,344.32
(c) the amount of instalments in arrears as at 7 December 2000	RM 774,590.66
(d) the amount remaining due under the charge as at 7 December 2000	RM5,763,043.71

Paragraph 8 of the defendant's affidavit in reply affirmed by defendant's director Goh Chai Hoe on 19 January 2001 made a general denial of para. 10 above without any particularisation as to how and why the aforesaid statutory particulars given by the plaintiff have contravened the terms of the annexure to the charge. As far as these statutory particulars are concerned, I arrive at a specific finding that the provisions of O. 83 r. 3(1) and (3) have been complied with by the plantiff.

Further pursuant to s. 257(1)(c) of the National Land Code 1965, the plaintiff has in para. 3 of the latest affidavit affirmed on 19 January 2002 (encl. (13)) specified the total amount, ie, RM6,570,479.60 as at 31 January 2002 due to the chargee, ie, the plaintiff. Hence, I am of the view the defendant's submission that the plaintiff has not complied with O. 83 r. 3(3) cannot hold water.

Nature Of Charge Action And Judge's Duty

In *Malaysia Building Society Bhd, supra*, I have the occasion to deal with the nature of a charge action and judge's duty which I reproduce, where relevant, at pp. 109 to 111 as follows:

> ... The nature, rights and obligations of the parties in such a charge action has been authoritatively stated with unrivalled clarity by Eusoff Chin SCJ (later CJ Malaysia) in the then Supreme Court in *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332 as follows:
>
> > The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code

> does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s. 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are culled from several decisions of our courts which have correctly stated the law upon the subject.

In the present application for an order for sale, the burden of proof lies on the defendant to show the existence of cause to the contrary under s. 256(3) of the NLC. In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 the Federal Court enunciated that the expression "cause to the contrary" in s. 256(3) of the NLC is limited to only the following three categories:

1. when a chargor is able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the NLC;

2. when a chargor is able to demonstrate that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale; and

3. when a chargor is able to demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

The Federal Court gave a very narrow and restrictive interpretation of the words "cause to the contrary" and explained their reasons as follows:

> We are conscious that the approach we have adopted results in a very narrow and restrictive interpretation of s. 256(3) of the code. But there are good reasons of policy for such an interpretation. It must not be forgotten that in the ordinary way, banks and other financial institutions loan moneys deposited with them by their customers to a borrower on the faith of the security of a charge created over the landed property of the borrower, or as here, of a third party. In the event of a default by the borrower, the lending institution normally looks to early recovery of all or a substantial part of the money due to them from a sale of a security. If the courts of this country interpret the phrase 'cause to the contrary' appearing in s. 256(3) of the Code liberally, then, institutional lenders would lose confidence in their right to realise their security through an order for sale. Financial institutions would then become reluctant to lend money to *bona fide* entrepreneurs. Commerce would come to a standstill and the development of land and industries in this country which are largely dependent upon loans from banks would cease. No judgment of this court will be designed to produce such a consequence.

The Federal Court stated the approach to be taken by a judge in hearing an application under s. 256 of the NLC is as follows:

> A judge hearing an application under s. 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O. 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.
>
> In this last respect, if he is satisfied, on a careful and an objective assessment of the factual material made available to him, that the chargor has shown cause to the contrary in the sense we have discussed earlier in this judgment, he will refuse an order for sale. On the other hand, if he finds as a matter of law that the allegations raised by the chargor do not constitute cause to the contrary he will merely say so, giving his reasons, and grant the chargee's application.
>
> On no account should he express any view on the merits of any or all of the points taken by the chargor, save to say whether, having regard to the three narrow categories we have laid down in this judgment and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction. This is because, for reasons which will appear in a moment, any view expressed by a judge on the general merits of the points taken by the chargor will be purely academic.
>
> …
>
> A judge who makes an order for sale merely finds that the facts relied upon by the chargor to resist the chargee's application do not constitute cause to the contrary. He is unconcerned with the issue whether the same facts are sufficient to support an action in personam that may be brought by the chargor against the chargee. There is thus no determination of an issue or a cause for an estoppel to operate against the chargor's action.

In *Standard Chartered Bank Malaysia v. Arivalagan Krishnan & Anor* [2001] 4 CLJ 168, I applied the aforesaid principles of the Federal Court and not the Court of Appeal, as was stated in my said judgment.

I now apply the same principles in the instant originating summons.

Conclusion

Defendant's learned counsel has done her utmost to protect the defendant's interest but the law and the facts are, in my view, not in favour of the defendant. On the foregoing grounds I arrive at the conclusion that the defendant has failed to establish any cause to the contrary. I therefore make an order for sale in terms of the originating summons herein to realise the sum of RM6,570,479.60 as at 31 January 2002 based on the affidavit affirmed by one Goh Teck Kian on 19 January 2002.